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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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THE PEOPLE,

Plaintiff and Respondent,

v.

PAREN HASMUKHBHAI PATEL,

Defendant and Appellant.

C060284

(Super. Ct. No. 08F2568)

Convicted of inflicting corporal injury on a cohabitant/former cohabitant (domestic violence), defendant Paren Hasmukhbhai Patel makes two arguments on appeal. First, he contends his trial was fundamentally unfair because the prosecution was allowed to introduce evidence of his prior acts of domestic violence against the victim but he was not allowed to use the victim's prior domestic violence conviction to show her propensity for violence. Second, he contends he was denied his constitutional right to confront the victim because the prosecution was allowed to elicit her testimony that she had

been sober for seven months but he was not allowed to elicit testimony that she had been incarcerated during that time.

We conclude neither of defendant's arguments is properly before us. First, because his trial attorney never sought to use the victim's domestic violence conviction to show her propensity for violence, any claim of error in the trial court's limitation on the use of that conviction was forfeited. Second, because defendant did not argue in the trial court that he had a federal constitutional right to offer evidence of the victim's incarceration, he forfeited that argument as well. Accordingly, we will affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

Defendant and the victim began living together in the victim's apartment in September 2007. In early December 2007, the victim moved out of her apartment and began "jump[ing] back and forth" between two motels. Defendant stayed with her in both motels.

On January 1, 2008, defendant and the victim got into an argument in the victim's motel room. After the victim refused defendant's request to watch his friend's son while he went out, defendant "just flipped," "grabb[ing]" her, "slapping [her] in the head," "hitting [her]," and "kicking [her]" after she fell to the ground. During the fight, he "pulled the phone out of the wall."

In March 2008, defendant was charged with domestic violence and cutting a utility line. The complaint also alleged two prior convictions (which defendant later admitted).

At the outset of the trial in August 2008, the prosecutor moved to admit evidence of defendant's prior conviction for robbery for purposes of impeachment if defendant testified. The court granted that motion. The prosecutor then moved to exclude any reference to the victim's parole status and the fact that she was in custody. Defense counsel opposed that motion, arguing that the victim's prior conviction for domestic violence was "going to be at issue" because the victim was going to testify as a witness. Defense counsel also argued that the fact the victim was on parole for that offense and was in custody on a parole violation was "just as relevant . . . as the original offense itself" because "[i]t shows that she continues to violate the law, and . . . we don't want [her] to have" a "[f]alse aura of lawfulness." The prosecutor conceded the victim's prior conviction would be admissible for impeachment purposes, but argued her parole status did not "go to credibility, and it's prejudicial to the People." The trial court agreed evidence of the victim's parole and custodial status was inadmissible "propensity evidence" and granted the motion over defense counsel's objection, subject to an application to revisit the issue outside of the jury's presence.

The prosecutor then requested that the court instruct the jury that the victim's prior conviction could be "used only for the purpose of evaluating her truthfulness, her credibility as a witness, and not as evidence of propensity," since it appeared defendant would not be testifying and therefore would not be claiming self-defense. The court agreed to instruct the jury

accordingly when the evidence of the victim's prior conviction was elicited and at the conclusion of the case. Defense counsel did not object and did not argue that the victim's prior conviction should be admitted for a purpose other than impeachment.

The prosecutor moved, pursuant to Evidence Code section 1109, to admit evidence of defendant's prior acts of domestic violence against the victim -- specifically, the victim's testimony that defendant had assaulted her about 15 times in the month before the charged incident. Defense counsel offered no opposition, and the court granted the motion.

During the victim's testimony, the prosecutor elicited evidence that defendant had assaulted her about 15 times during their relationship, beginning near the end of December 2007. She then testified about the fight on January 1, 2008. In the course of examining the victim, the prosecutor elicited testimony that she was an alcoholic and had used methamphetamine off and on during her relationship with defendant, but she had not had a drink in about seven months and was not using methamphetamine "today."

In the midst of the victim's testimony, defense counsel asked to address some matters outside the presence of the jury. Counsel argued that because the prosecutor had elicited testimony that the victim had "been clean and sober basically for seven months," he was "entitled to explore the reasons and inspiration behind that, meaning her incarceration, the fact that she really doesn't have a choice." The prosecutor argued

there was "absolutely no probative value to the reasons why she's been sober. The reason it's significant that she's sober is it goes to her ability to recollect the evidence today, and to testify today about what occurred seven months ago. That's why it's relevant. The fact that she's sober is relevant. [¶] The reason that she's sober, whether it was because she just made a decision to stop using or whether because she was incarcerated and had no choice, is completely immaterial and it's terribly prejudicial." Defense counsel argued they were "misrepresenting the character of the witness and . . . the nature of th[e] witness' past few months of her life." The court concluded the probative value of the reason for the victim's sobriety was outweighed "by the substantial prejudice that would result by the jury hearing that . . . she's been sober . . . because of incarceration." Accordingly, the court ruled that defense counsel could not "go into [the victim's] custodial status."

Subsequently, the prosecutor elicited the victim's admission that she had a prior conviction for domestic violence from 2000. On cross-examination, defense counsel elicited further testimony from the victim regarding her prior conviction.

The defense rested without presenting any evidence. The jury found defendant guilty of domestic violence but deadlocked on the charge of cutting a utility line, and the court declared a mistrial on that charge. The court subsequently sentenced defendant to an aggregate term of 10 years in prison.

## DISCUSSION

### I

#### *Evidence Of The Victim's Domestic Violence Conviction*

Defendant argues that to prove he committed domestic violence, the prosecution had to prove that he acted "with wrongful intent or unlawfully," i.e., that his actions were "unjustified." (Italics omitted.) He further argues that he "sought to introduce evidence of [the victim's] domestic violence conviction in order to attempt to show that his actions were justified, that is, that any force he used against [her] was not done with wrongful intent -- that it was not unlawful," but he "was prevented from using [her] conviction . . . to show predisposition or propensity to commit domestic violence," and "[t]his was error."

In violation of the Rules of Court, defendant does not cite the record to show where he "sought to introduce evidence of [the victim's] domestic violence conviction" to prove her propensity to commit domestic violence or to show where the court "prevented [him] from using [her] conviction" for that purpose. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [each brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"], rule 8.360(a) [with exceptions not applicable here, "briefs in criminal appeals must comply as nearly as possible with rule[] . . . 8.204"].) Indeed, our own review of the record reveals that neither of these things ever occurred. When the prosecutor asked the court to instruct the jury that

the victim's prior conviction could be "used only for the purpose of evaluating her truthfulness, her credibility as a witness, and not as evidence of propensity," defense counsel offered no objection or argument to the contrary.<sup>1</sup> Absent an actual attempt by defendant to use the victim's domestic violence conviction for a purpose other than impeachment, or at least an argument by defendant in opposition to the prosecutor's motion to limit the use of the conviction to impeachment purposes, this claim of error is forfeited. (See, e.g., *People v. Kaurish* (1990) 52 Cal.3d 648, 704 [on appeal, defendant may not argue a different ground for admissibility of evidence than that argued in the trial court].)

In a footnote, defendant perfunctorily contends that if his trial attorney "did not adequately request to admit the prior conviction of the [victim] to show her propensity or predisposition to commit domestic violence, or did not adequately preserve the issue, defense counsel rendered constitutionally ineffective assistance of counsel in failing to do so." Because it is not properly set forth and developed in

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<sup>1</sup> For the first time in his reply brief, defendant attempts to show where in the trial court proceedings he attempted to "use evidence of the . . . witness'[s] prior conviction . . . as affirmative evidence that she may have assaulted [him] on the day in question." The portion of the record he cites, however, shows only defense counsel's arguments about why defendant should have been allowed to elicit evidence of the victim's *parole and custodial status*. At no point did defense counsel argue that defendant should be allowed to use the victim's prior domestic violence conviction to show her propensity for violence.

the text under a separate heading, this argument is also forfeited.<sup>2</sup> (See Cal. Rules of Court, rule 8.204(a)(1)(B) [appellate brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument"]; *People v. Crosswhite* (2002) 101 Cal.App.4th 494, 502, fn. 5 [argument is forfeited "by raising it only in a footnote under an argument heading which gives no notice of the contention"].)

## II

### *Evidence Of The Victim's Incarceration*

Defendant contends the trial court erred in precluding him from eliciting testimony that the victim was (and had been) in custody in order "to show that the prosecutor's evidence of sobriety, reform and veracity was subject to dispute." He contends "this error was a denial of the constitutional right of confrontation."

In arguing before the trial court that he should be allowed to elicit testimony of the victim's custodial status, defendant

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<sup>2</sup> Just one example of the perfunctory nature of this argument is that while defendant acknowledges a claim of ineffective assistance of counsel must be predicated on a showing "that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms," he offers no argument as to why his trial attorney's failure to argue that the victim's prior conviction should be admitted to show her propensity for violence fell below that standard.



did not contend that the federal Constitution compelled admission of that testimony, and he may not do so for the first time on appeal. (See *People v. Smithey* (1999) 20 Cal.4th 936, 995.) Thus, the only possible question before us is whether the trial court committed an error of state law in excluding the proposed evidence. Defendant has shown no such error.

The trial court precluded defendant from offering evidence of the victim's incarceration because the court found the evidence would be more prejudicial than probative. (See Evid. Code, § 352 ["The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice"].) We would normally review that ruling for abuse of discretion. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) Here, however, defendant does not argue that the trial court abused its discretion under Evidence Code section 352 in precluding him from eliciting testimony of the victim's incarceration. Instead, he focuses his argument exclusively on the constitutional "right of confrontation" issue. But, as we have noted, defendant forfeited that argument

by not raising it in the trial court. Accordingly, no showing of reversible error, under either state or federal law, has been made.

DISPOSITION

The judgment is affirmed.

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ROBIE, J.

We concur:

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SIMS, Acting P. J.

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BUTZ, J.